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Preemption Under the Federal Railway Safety Act: Death of a Plaintiff's Cause of Action?

I. INTRODUCTION

In 1970 Congress enacted the Federal Railway Safety Act (hereinafter "FRSA").¹ The purpose of the FRSA was "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons" ² Ironically, the FRSA has been recently utilized by defendants to defeat common law claims of negligence brought against railroads. The typical scenario goes something like this: plaintiff is injured in a grade crossing accident. She files suit alleging that the railroad was negligent in failing to provide sufficient warning signs or devices, failing to provide sufficient warning of an approaching train, and failing to maintain its right of way to allow sufficient sight and/or hearing distance so as to warn the plaintiff of an approaching train. Defense counsel moves for partial summary judgment on these issues, asserting preemption under the FRSA.³ The gist of defendant's motion is that, with respect to the sufficiency or adequacy of railroad crossings, responsibility and the concomitant duty of maintenance has been preemptively assumed by the federal government. In turn, certain regulatory functions have been reserved for the states.⁴ That is, it is the duty of the state, not the railroad, to survey grade crossings and identify the need for protective devices and to implement a schedule of projects to accomplish this. Therefore, the defense argues, the railroad has no duty to the plaintiff injured as a result of a defective

1. 45 USC § 421 et seq (1970).

2. 45 USC § 421 (1970).

3. Most commonly, the preemption argument is raised at the summary judgment stage. However, it may also be raised as a defense or in a motion to dismiss. Charles F. Preuss, *Federal Preemption of State Tort Actions: When and How*, Def Couns J 434, 444 (Oct 1990).

4. See Highways, 23 USC § 130(d) (1987), which provides:

Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose

Id.

railroad crossing. Absent a duty owed by the defendant, there can be no finding of negligence.

The scope of this comment is to provide an insight into the legitimacy of these preemption claims. The comment will begin with the early railroad liability cases, setting the stage for grade crossing negligence cases. Attention will then be focused upon the FRSA itself, followed by an analysis of the cases which have interpreted the Act's preemptive effect. In concluding, an assessment will be made of the various advantages and disadvantages of preemption of common law state negligence claims.

II. HISTORY OF RAILROAD LIABILITY

Railroad companies first raised the defense of compliance with government standards over a century ago.⁵ It was during this period that the federal government first began to systematically regulate the railroads. However, the courts refused to exonerate the railroad companies from liability simply because they complied with the minimum statutory requirements.⁶

In *Grand Trunk Ry. Co. v Ives*,⁷ the Supreme Court of the United States was faced with the issue of compliance with government standards as a defense to tort liability. At the outset of its analysis, the Court opined that issues of railroad crossing accident cases are necessarily fact sensitive.⁸ Therefore, the Court held that the jury should determine the issue of the railroad's negligence.⁹

In discussing the issue of regulatory compliance, the Court noted that most states had ruled that railroads could be held liable for negligence, even though they had fully complied with statutes prescribing signals to be given and other precautions to be taken.¹⁰ The reason for the state courts' refusal to permit this defense is well grounded in the common law principle that "every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way."¹¹

As a result of these decisions, the common law rule that compli-

5. See, for example, *Chicago, Burlington and Quincy R.R. Co. v Perkins*, 125 Ill 127, 17 NE 1 (1888), and *Thompson v New York R.R.*, 110 NY 636, 17 NE 690 (1888).

6. *Id.* "The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety and common prudence may dictate." *Chicago*, 17 NE at 5.

7. 144 US 408 (1892).

8. *Grand Trunk Ry. Co.*, 144 US at 420.

9. *Id.* at 427.

10. *Id.* at 420-21.

11. *Id.* at 421.

ance with government standards establishes only minimum standards developed fairly early and continued for nearly a century.¹² However, beginning in the 1980s, courts began to hold that the FRSA preempted the field of railroad regulation and that compliance with regulations promulgated under the FRSA exonerated railroad companies from liability.¹³

III. THE FRSA

As noted at the outset, the purpose of the FRSA is set forth in Section 421 of the Act, which provides:

The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.¹⁴

The FRSA further empowers the secretary of transportation to prescribe appropriate rules, regulations, orders, and standards for all areas of railroad safety.¹⁵ The Act also provides for a comprehensive study to be made as a means of eliminating and protecting railroad grade crossings.¹⁶ Pursuant to this authority, the secretary of transportation has issued various regulations¹⁷ specifying the requirements, duties, and responsibilities imposed upon the states as to railroad grade crossing safety. These regulations also include the vesting of responsibility in the public authorities as to the need for, and selection of, highway warning devices.¹⁸ These regulations

12. For subsequent cases following *Grand Trunk Ry. Co.*, see, for example, *Southern Pacific R.R. Co. v Mitchell*, 80 Ariz 50, 292 P2d 827 (1956), and *New York Central R.R. Co. v Chernew*, 285 F2d 189 (8th Cir 1960).

13. See *Marshall v Burlington Northern, Inc.*, 720 F2d 1149 (9th Cir 1983).

14. 45 USC § 421 (1970).

15. 45 USC § 431 (1970).

16. 45 USC § 433 (1970). It is clear that the issue of grade crossing safety was a prime concern of Congress. This concern is set forth in the legislative history of the Act, where the House Interstate and Foreign Commerce Committee stated that:

It is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. The need to do something about these terrible accidents which have one of the highest incidents of death and injury per accident, necessitates an immediate attack on the grade crossing problem as soon as possible. HR Rep No 1194, 91st Cong, 2nd Sess 11 (1970), reprinted in 1970 US Code Cong & Admin News 4104, 4116 (1970).

17. See 23 CFR § 646.200 et seq (1975). See also 23 CFR § 655.601(a) (1983), which adopted the "Manual on Uniform Traffic Control Devices for Streets and Highways" (hereinafter "MUTCD").

18. Part VIII of MUTCD (which deals with traffic control systems for railroad-highway crossings) provides:

8a-1 Functions. The determination of need and selection of devices at a grade cross-

provide the foundation for the railroad companies' assertion that the common law duty of maintenance has been preemptively assumed by the federal government.

Perhaps the most fatal provision for a plaintiff's case is Section 434 of the FRSA, which provides:

The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety *shall be nationally uniform to the extent practicable*. A State may adopt or continue in force any law . . . relating to railroad safety until such time as the Secretary has adopted a rule . . . covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law . . . relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law . . . and when not creating an undue burden on interstate commerce.¹⁹

Section 434 provides the basis for which some courts have held that the FRSA prevents not only state regulation in the field but also state common law tort claims.²⁰

IV. THE TEST FOR FEDERAL PREEMPTION

Under the Supreme Court's most recent test for federal preemption,²¹ state law is preempted under the Supremacy Clause²² in three circumstances. First, Congress can explicitly define the extent to which the FRSA preempts state law.²³ Second, state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively.²⁴ Finally, state law is preempted to the extent it actually conflicts with federal law.²⁵ Courts that upheld preemption of tort claims under the

ing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation, and operation shall be in accordance with the national standards contained herein. [page 8A-1]. 8D-1 Selection of Systems and Devices. The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations Based on an engineering and traffic investigation, a determination is made whether any active control system is required at a crossing and, if so, what type is appropriate.

19. 45 USC § 434 (1970) (emphasis added).

20. See, for example, *Armijo v Atchison, Topeka, and Santa Fe Ry. Co.*, 754 F Supp 1526 (D NM 1990), *Hatfield v Burlington Northern R.R. Co.*, 757 F Supp 1198 (D Kan 1991), and *Marshall v Burlington Northern, Inc.*, 720 F2d 1149 (9th Cir 1983).

21. *English v General Electric Co.*, 496 US 72 (1990).

22. US Const, Art VI, cl 2.

23. *English*, 496 US at 78.

24. *Id.* at 79. This occurs where federal regulation in the field is pervasive. However, where the regulations are in an area traditionally occupied by the states, congressional intent to preempt must be "clear and manifest." *Id.*

25. *Id.*

FRSA have done so under the first circumstance, based upon the explicit language set forth in Section 434 of the statute.²⁶

V. COURT DECISIONS INTERPRETING THE FRSA'S PREEMPTIVE EFFECT

In the early 1980s, courts first began to recognize preemption under the FRSA as a defense to negligence claims brought against railroads.²⁷ However, the opinions in the federal circuits are divergent as to the effect and extent of preemption.²⁸ Over the past decade, a pattern has developed whereby the decisions dealing with preemption under the FRSA may be divided into three categories: (1) strict preemption, (2) no preemption, and (3) contingent preemption.²⁹

A. *Strict Preemption*

To date, only one federal court has applied the principle of strict preemption.³⁰ In *Armijo v Atchison, Topeka and Santa Fe Ry. Co.*,³¹ a district court in New Mexico found that, with regard to the installation of warning devices, the FRSA explicitly preempted state law.³² Although no administrative decision had been made regarding the crossing in question, the court based its decision on the Railroad-Highway Projects regulations outlined in the Code of Federal Regulations³³ and the adoption of the Manual on Uniform Traffic Control Devices.³⁴ As a result, the court held that any state common law duty imposed upon the railroad with respect to warning devices at grade crossings had been preempted by federal law.³⁵ In turn, the responsibility and authority for determining the need for and selection of crossing signals had been delegated to the ap-

26. See *Armijo*, 754 F Supp at 1530, and *Hatfield*, 757 F Supp at 1202.

27. See, for example, *Marshall v Burlington Northern, Inc.*, 720 F2d 1149 (9th Cir 1983).

28. See *Karl v Burlington Northern R.R. Co.*, 880 F2d 68 (8th Cir 1989) (no preemption); *Marshall*, 720 F2d at 1153 (preemption does not occur until the appropriate agency has made a decision regarding the adequacy of the crossing in question); *Armijo*, 754 F Supp at 1530 (complete preemption).

29. *Hatfield*, 757 F Supp at 1205.

30. *Armijo*, 754 F Supp at 1526. It should be noted, however, that the court in *Armijo* alternately relies upon the contingent preemption rationale, discussed *infra*. *Id* at 1531-32.

31. 754 F Supp 1526 (D NM 1990).

32. *Armijo*, 754 F Supp at 1531. The court referred to Section 434 of the FRSA.

33. 23 CFR § 646.200 et seq (1975).

34. See note 18.

35. *Armijo*, 754 F Supp at 1531.

propriate public authority.³⁶

B. *No Preemption*

At the other end of the spectrum lies the argument that there is no preemption of common law negligence claims under the FRSA. Under this theory, summary judgment will be denied even if the public agency with jurisdictional authority has made a determination of the adequacy of warning devices at the situs of the tort. Courts following this theory rely upon the common law principle that compliance with a legislative enactment or administrative regulation does not necessarily prevent a finding of negligence where a reasonable man would take additional precautions.³⁷

The Eighth Circuit followed this view in *Karl v Burlington Northern RR. Co.*³⁸ In *Karl*, the plaintiff brought a negligence action against the railroad for injuries sustained at a crossing collision.³⁹ The defendant railroad argued that it had no duty to upgrade its warning devices because the appropriate public agency had already approved the warning devices at the crossing in question.⁴⁰ The court, in declining to adopt Burlington's preemption argument, asserted that the FRSA merely represents an effort by the federal government to improve the safety of grade crossings and does not lessen the statutory or common law duty to maintain a "good and safe" crossing.⁴¹ Burlington further argued that since it had complied with all statutory safety requirements, it should not be liable for negligence.⁴² The court answered this contention by citing Section 288C of the Restatement (Second) of Torts, which provides that "compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."⁴³ Thus, the railroad was held liable for failing to upgrade warning devices at the crossing.⁴⁴

36. *Id.* The state's Public Service Commission is vested with the responsibility of determining grade crossing safety. In Pennsylvania, the Public Utility Commission has exclusive jurisdiction over highway-rail crossing proceedings. *Philadelphia v PA Public Utility Comm.*, 91 Pa Cmwth 923, 496 A2d 924 (1985).

37. See *Karl*, 880 F2d at 76.

38. 880 F2d 68 (8th Cir 1989).

39. *Karl*, 880 F2d at 69.

40. *Id.* at 75-76.

41. *Id.* at 76.

42. *Id.*

43. *Id.*, citing the Restatement (Second) of Torts § 288C (1965).

44. *Karl*, 880 F2d at 70.

Similarly, a district court in the ninth circuit denied recognition of the railroad's preemption defense. In *Southern Pacific Trans. Co. v Maga Trucking Co.*,⁴⁵ the trucking company counterclaimed for damages to its tractor/trailer allegedly caused by the railroad's negligent maintenance of the crossing.⁴⁶ The railroad moved for summary judgment based on federal preemption.⁴⁷ The court denied the motion, stating that preemption had been limited to voiding state statutes and local ordinances attempting to regulate specific areas governed by federal regulations.⁴⁸ Additionally, the court noted that even if state common law is preempted by the FRSA, there is no need to foreclose recognition of the federal common law of negligence.⁴⁹ These cases reaffirm the traditional view that compliance with government standards is not a defense to tort liability.⁵⁰ However, the contingent preemption view has become the most popular position in the federal courts.

C. Contingent Preemption

Under the contingent preemption view, preemption is conditioned upon a determination by the appropriate agency as to the adequacy of warning devices at the particular crossing. Until such a decision is reached, the railroad's common law duty of maintenance of the crossing remains intact.

The leading authority cited for this position is *Marshall v Burlington Northern, Inc.*⁵¹ In *Marshall*, a wrongful death action, the widow of a motorist killed in a train/truck collision received a jury verdict in her favor.⁵² On appeal, the railroad argued that evidence of the adequacy of the crossing should have been excluded.⁵³ In this case, however, the authorized public agency had not made a determination of the adequacy of the crossing in question.⁵⁴ Deciding that preemption had not yet occurred, the Ninth Circuit held

45. 758 F Supp 608 (D Nev 1991).

46. *Southern Pacific Trans. Co.*, 758 F Supp at 609.

47. *Id.*

48. *Id.* at 612.

49. *Id.*, citing *Urie v Thompson*, 337 US 163 (1949), where the Supreme Court held that "what constitutes negligence [under the Federal Employer's Liability Act] is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes." *Urie*, 337 US at 174.

50. See Section II of this comment.

51. 720 F2d 1149 (9th Cir 1983).

52. *Marshall*, 720 F2d at 1151.

53. *Id.* at 1154.

54. *Id.*

that until a decision is reached, the railroad's duty under applicable state law is to maintain a "good and safe" crossing.⁵⁵ The contingent preemption view has recently been adopted by several district courts.⁵⁶

Although each of these views has merit, they must be examined in light of the purposes for which the statute was enacted, the competing interests at stake, and the effect that preemption will have upon tort claims.

VI. PERSPECTIVE

Although the purpose of the FRSA was to promote safety,⁵⁷ it is clear that Congress also sought to prevent "subjecting the national rail system to non-uniform enforcement in 50 different judicial and administrative systems."⁵⁸ It is through these goals (which sometimes conflict, as this comment illustrates) that one may gain an insight into the intent of Congress in enacting the FRSA and the effect that was desired for both the railroad industry and the tort claimant.

It is clear that defense counsel have a strong argument for preemption. Congress validly exercised its power under the Interstate Commerce Clause⁵⁹ in enacting the FRSA. Furthermore, it is unquestionable that regulations promulgated under the FRSA supersede state regulation under the Supremacy Clause.⁶⁰ However, the issue yet to be answered is what constitutes state regulation. Clearly, legislative enactments and administrative regulations attempting to govern the field of railway safety constitute state regulation. However, tort actions are brought to compensate an injured plaintiff, not to regulate the railroad industry. Thus, it is a long leap to conclude that such actions are preempted under the FRSA.

Moreover, it is a time-honored common law principle that compliance with government regulations does not prevent a finding of

55. *Id.*

56. See, for example, *Anderson v Chicago Central and Pacific R.R. Co.*, 771 F Supp 227 (N D Ill 1991) (defendant was granted leave to amend its affirmative defense of federal preemption to show that local agency had made determination as to appropriate warning devices); *Hatfield*, 757 F Supp at 1198 (adopting the *Marshall* standard); and *Easterwood v CSX Trans. Inc.*, 742 F Supp 676 (N D Ga 1990) (department of transportation's decision not to install gate arms constitutes federal decision and thus claim is preempted).

57. 45 USC § 421 (1970).

58. HR Rep No 1194, 91st Cong, 2nd Sess 11 (1970), reprinted in 1970 US Code Cong & Admin News 4104, 4109 (1971).

59. US Const, Art I, § 8, cl 3.

60. US Const, Art VI, cl 2.

negligence where a reasonable man would take additional precautions.⁶¹ In his article, *The Role of Regulatory Compliance in Tort Actions*,⁶² Paul Dueffert⁶³ suggests that defendants' compliance with strict, complex government regulations should suffice to immunize them from liability. However, this view ignores the fact that each tort case stands on its own facts.⁶⁴ Thus, the courts should not place a blanket restriction on all tort claims simply because of pervasive government regulation.

It may also be suggested that preemption is valid under a public policy/economic argument—that is, to save the ailing railroad industry and help the national economy. However, a defense based on this argument would have a chilling effect on plaintiffs' claims. How could justice be served if General Motors were permitted to assert a defense in a products liability case based on the ailing American car industry? Would it be fair to allow the state to assert "fiscal problems" as a defense to a claim against it? Moreover, such an argument goes against the principle of law and economics: an injured plaintiff should have redress against a negligent defendant.

Several other principles support the denial of the preemption defense. Where Congress has legislated in a field of traditional state regulation, it is assumed that the states' powers were not meant to be superseded.⁶⁵ The assumption that the historic police powers of the state is not meant to be superseded lies in the Tenth Amendment of the United States Constitution, which reserves all powers not specifically granted to the federal government to the states. Although the federal government has regulated the railroads for decades, it has yet to impose its powers upon state tort actions.

Additionally, it is axiomatic that legislative enactments in derogation of rights are to be strictly construed.⁶⁶ Under this principle, "no act should be construed as infringing upon such rights except

61. Restatement (Second) of Torts § 288C (1965). See also Section II of this comment. It is interesting to note that the preemption courts did not discuss this issue.

62. 26 Harv J Leg 175 (1989).

63. Law Clerk to the Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit; B.A., University of Minnesota, 1985; J.D., Harvard Law School, 1988.

64. For instance, greater care must generally be exercised at crossings in urban areas than in rural areas. Other factors include the landscape surrounding the crossing and vegetative growth.

65. *Sun Ship, Inc. v Pennsylvania*, 41 Pa Commw 302, 398 A2d 1111, aff'd, 447 US 715 (1980).

66. 73 Am Jur 2d Statutes § 283 (1974).

by clear, unambiguous, and peremptory language."⁶⁷ One might argue that Section 434 of the FRSA, which sets forth nationally uniform standards, meets this requirement. However, The FRSA appears to speak only in terms of public law regulation. This is to be distinguished from private causes of action, such as negligence claims, about or regarding which the Act is silent. Thus, such negligence claims should not be barred under an expansive reading of the FRSA.

Finally, preemption may effectively close the door to recovery on an injured plaintiff. If the railroad is absolved from liability, there is only one other entity from which the plaintiff may seek redress: the state. Thus the plaintiff will be required to overcome an additional obstacle—that of sovereign immunity.⁶⁸

VII. CONCLUSION

In concluding, it should be stressed that this comment does not suggest that all persons injured at grade crossings should be entitled to recovery. Rather, it is merely suggested that a blanket restriction should not be placed on a cause of action based upon an expansive reading of the FRSA. As noted before, tort cases are necessarily fact sensitive. Thus, a factual determination should first be made to determine whether the railroad was negligent and whether such negligence was the proximate cause of the injury. By taking certain decisions from the jury based upon a legal conclusion, an injured plaintiff may be denied recovery even though the railroad was at fault. There is nothing in the legislative history or the FRSA itself to indicate that Congress intended this result.

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67. *Id.*

68. Black's Law Dictionary defines sovereign immunity as "A judicial doctrine which precludes bringing suit against the government without its consent." *Black's Law Dictionary* 1396 (West, 6th ed 1990).